on either side, I entertain no doubt that according to the practice of the Scotch Courts it would be quite competent for the appellant to prove that the respondents had annually obtained the licence of the superior. I do not mean to suggest that the appellant will be able to adduce any such proof; but I neither know what evidence he may have, nor am able to judge what its possible effect may be, when taken in conjunction with the facts which he has admitted. I am therefore of opinion that the respondents' plea of acquiescence ought not to be disposed of until the facts of the case have been ascertained in the usual way.

I do not think it necessary to criticise in detail the records in the *Earl of Zetland* v. *Carmichael*, and the *Earl of Zetland* v. *M'Arthur*, because in both of them the pleadings of the parties appear to me to be in substantially the same position, the appellant in his answers having laid sufficient foundation to entitle him to put in evidence facts and circumstances tending to show that notwithstanding the long continued use of the respondents' premises for the sale and consumption of exciseable liquors, the superior did not, either expressly or by implication, consent to the absolute discharge of the prohibition.

I am therefore of opinion that in all these appeals the interlocutor of the Court below ought to be reversed, and judgment given in the terms proposed by the noble and learned Lord on the woolsack.

Interlocutors appealed from reversed; causes remitted to the Court below to proceed therein as may be just, with expenses to the pursuer in the Court below from the dates of the Lord Ordinary's interlocutors appealed against; all other questions being reserved for the disposal of the Court below; the appellant to have the costs of the present appeal.

Counsel for the Appellant—S.-G. Asher, Q.C.—Benjamin. Agents—H. G. & S. Dickson, W.S., and W. A. Loch.

Counsel for the Respondents—Lord Advocate Balfour, Q.C.—R. V. Campbell. Agents—James Wilson, L.A., and Andrew Beveridge.

Thursday, June 15.

(Before Lord Chancellor Selborne, Lords O'Hagan, Blackburn, and Watson).

WHYTE *v.* HAMILTON.

(*Ante*, July 13, 1881, vol. xviii., p. 676, and 8 R. 940.)

Succession—Testamentary Writ—"Notes of Intended Settlement"—Proof—Competency of Parole.

A document holograph of the granter, disposing completely and regularly of his whole heritable and moveable estate, was headed "Notes of intended settlement;" the granter left no other testamentary writing. *Held (aff.* judgment of the Court of Session) that the terms of the title justified the admission of evidence *prout de jure* to confirm or to disprove the testamentary character of the document, and that, the evidence so led being neutral in its result, the ambiguity of the title was not sufficient to show that the document was not a final expression of the granter's will; and the document *sustained* accordingly as a valid testamentary writing.

This case was decided by the Second Division of the Court of Session on July 13, 1881, *ante*, vol. xviii, p. 676, and 8 R. 940.

The defenders appealed and were heard by the House, but the pursuer was not called on.

At delivering judgment—

Lord Chancellor—My Lords, the question in this case appears to me to admit of no serious doubt or difficulty, and I believe that that is the opinion of your Lordships, and therefore we have not thought it necessary to call upon the learned counsel who appear to support the judgment of the Court below to address us. The sole question is, whether this document, entitled "Notes of intended settlement by Walter Whyte of Bankhead" is, as the Court below have thought, a complete and perfect will of the testator. It is in his handwriting, holograph, and signed by him, and it is not suggested that, if it was originally a will, anything to revoke it took place during his lifetime. The argument has been that on account of the heading and absence of evidence which would tend to show that it was meant to be a will—if otherwise that conclusion cannot be arrived at—it cannot be so viewed.

Now, my Lords, I take it that the principles applicable to such questions admit of no reasonable doubt. In the first place, I lay it down that it is in my judgment a proposition universally true that nothing can receive probate which was not intended to be a testamentary act by the testator. Of course it might happen that something which he did not originally intend to be a testamentary act was converted into a testamentary act by a subsequent and sufficient manifestation of intention on his part, but either at the time when the act was originally done or at some other time he must in a sufficient way manifest his purpose that it should be a testamentary act, and with regard to all the cases which have been referred to, in which early death, sudden death, or anything of that kind was a material circumstance, I do not at all understand that the circumstance was ever held to make an instrument testamentary which had no testamentary character independently of it. The materiality of that particular state of circumstances arises with regard to instruments of which the testamentary character is deemed to be provisional and qualified, so that the question whether it continued testamentary, as expressive of the last will of the testator down to and at the time of his death, will depend upon the nature and circumstances of the qualification of the originally testamentary instrument with reference to which it may be said to have been provisional.

My Lords, with that preface I come to the next point, which is this, When you have an instrument in all points of form and in all points of substance on the face of it testamentary, and nothing more is needed to obtain probate of it in England or confirmation of it in Scotland (I am now of course speaking of it as operating upon personal estate) than proof of the mere act, yet if on the face of the instrument there is something to suggest a doubt or a question whether it

was in point of fact intended by the testator to be a testamentary act, it is not enough in order to obtain probate or confirmation to establish the mere *factum* of the handwriting or the signature in a case where attestation is not required, but you must do something more—you must put the Court in possession of some extrinsic circumstances which will enable the Court to judge whether it was in point of fact a testamentary instrument or not. Now, let me illustrate the reasons why something similar to what here appears in the title, "Notes of intended settlement by Walter Whyte of Bankhead," should let in that description of parole evidence. It is not that the Court proceeds upon the assumption that there is insoluble ambiguity in the instrument because of the existence of such a form of title, but because that form of title suggests the possibility that when extrinsic facts are known they may show something which will prevent the Court from treating it as a testamentary instrument. Let us suppose, for example, that in the present case evidence had been given to this effect, that on or soon after the 19th of June 1873, when this instrument bears date, the testator had sent it to his lawyer with a letter, saying—"I wish you to look over this and advise me upon it. I have not at present made up my mind whether I will make such a will or not, but I wish when I have heard from you to consider it." That would, I apprehend, if there were nothing more, have been enough to show that it was not when it was written testamentary, and of course it would have been necessary for those setting it up to show some subsequent act which made it testamentary, which in this case does not appear.

It was therefore held that such extrinsic evidence should be admitted. But the result, my Lords, of the extrinsic evidence which has been admitted is in my judgment really nothing. I shall afterwards state my reasons for thinking that those circumstances which have been noticed in the Courts below do amount to nothing; but for the present I simply state that that is the conclusion at which I have myself arrived.

Well, then, when after having invited and received such extrinsic evidence as it was possible to offer, the Court finds that no light is thrown upon the matter, what is it to do? It has been argued that any circumstances which lead the Court to receive such evidence, throw upon the person propounding the instrument a burden of proof which he fails to satisfy if the evidence is not confirmatory of the testamentary character of the instrument in a positive sense. My Lords, I do not think that there is any such rule, and I am perfectly sure that when the question is examined on principle no sound principle can be suggested in favour of such a rule. The natural consequence, as it appears to me, of the failure of extrinsic evidence to assist the Court in determining anything as to the character of the instrument, is that the Court will fall back upon the instrument itself and see what, upon a sound application of that principle, is the construction to be arrived at. It may be that upon a sound construction of the instrument it excludes the idea of its being a testamentary act. In that case, of course, the *onus* plainly would be upon a person asserting its testamentary character, to countervail the apparent character of the document by any sufficient and admissible evidence tending to show that in point of fact it is testamentary. But, on the other hand, if upon the face of the whole instrument, in the absence of evidence to the contrary, it appears that the intention of the testator was to make it testamentary, I am wholly unable to understand upon what imaginable principle you can refuse to construe it as you would construe any other document, and hold it to be testamentary if the intention of the testator collected from it is sufficiently clear in that direction.

My Lords, if that is so, the question is whether this particular title is such as to prevent a Court on construction from holding the instrument to be testamentary and continuing in operation as such until the death of the testator, which took place I think seven years after its date. That question may be divided into two parts in this way:—First of all, do these words "Notes of intended settlement by Walter Whyte of Bankhead" in themselves import that he did not mean it to be testamentary? If they do, then certainly I should agree with the appellants that that is necessarily fatal to the attempt to make it testamentary, at all events in the absence of proof that by some act, sufficient for testamentary purposes, he altered its original character. But, my Lords, I cannot for a moment hold that those words negative the idea that he meant it to have a testamentary effect. I will return to an examination of the instrument a little later. I have said that the question may be divided into two parts. I have stated the first, and the second would be, whether this instrument imports that if testamentary at all, it was so only in a temporary and provisional sense, and for a temporary and provisional purpose, which could not be presumed to continue, not having been executed during the period of seven years which elapsed until the testator's death.

Now, my Lords, I have said that I cannot construe the words as in themselves enough to negative a testamentary intention, and with regard to the argument on that point it is really founded mainly upon English cases (although there is some recognition of the principle of these cases in the judgments given in this House in the case of *Munro* v. *Coutts*) which arose in the English Courts as to imperfect testamentary instruments before the passing of the Wills Act. My Lords, with regard to the principle of those cases, I may say that they seem to me to have at all events no application here unless we first determine upon construction that this is within the sense of those authorities an imperfect testamentary instrument. The mere form of the title does not itself prove anything of that kind, and I apprehend that what is said by Mr Jarman in his Treatise on Wills, no doubt not with reference to any particular question exactly like the present, but in a general way, is perfectly true, and true as to wills of personal as much as to wills of real estate. At page 13 of the first volume of the third edition of that work Mr Jarman thus, I think, correctly states the law, which he proceeds to illustrate by some instances not similar to the present—but I refer to the passage for the principle. "The law has not made it requisite to the validity of a will that it should assume any particular form, or be couched in language technically appropriate to its testa-

mentary character. It is sufficient that the instrument, however irregular in form or inartificial in expression, discloses the intention of the maker respecting the posthumous destination of his property, and if this appears to be the nature of its contents, any contrary title or designation which he may have given to it will be disregarded." There is no reason whatever why what is here, in the cases mentioned by Mr Jarman as to wills of real estate, should not be true also as to wills of personal estate.

These cases of imperfect instruments to which reference has been so much made are thus described and correctly described in Williams' book on Executors, at page 71 of the last edition—"The word 'imperfect' when applied technically to instruments of this nature, means that the document is, upon the face of it, manifestly in progress only, and unfinished and incomplete as to the body of the instrument." I need not read more, because such a description of an imperfect paper seems to me to show that this is not an imperfect paper in that sense. I will presently consider whether the principle applicable to such imperfect papers may not be extended somewhat further when you show that the paper was intended for a purpose which related exclusively to giving present expression to a testamentary intention. And this appears to me to be as perfect a testamentary disposition as I ever saw. The words are all words *in præsenti*—"I liferent," "I leave," "I also leave" "are to revert back," "excluding," "I also exclude," "are to be handed over," "I also leave," "I likewise leave." From the beginning to the end it is perfect in form, perfect in substance, a complete disposition, all in positive words, and I can conceive nothing whatever which remains to be added or supplied for the purpose of the execution of those intentions which are apparent on the face of the instrument,—the instrument is absolutely wanting in nothing whatever. Therefore, my Lords, unless you are to extend the doctrine of imperfect testamentary instruments somewhat further by reason of the title, and the title only, this is not an imperfect, but it is a perfect instrument.

My Lords, I may also say that the case of Lord Scarborough's will extremely well illustrates what is meant by an imperfect instrument. There were there a number of imperfections in a sense very different from what you have here,—there were initials for the names, and every word almost was a symbol, so that to translate it into an intelligible form—intelligible by anyone but a member of the family at all events—would be a difficult matter. Nothing could be more clear and obvious than that the instrument was not intended as a testamentary instrument even if there had not been on the face of it a declaration that it was meant as instructions to his solicitor. It received effect provisionally, but it was an imperfect instrument coming within this description.

Now, it may be—I will not say that it is, because it is not at all necessary to go into a minute examination of the English rule in the Probate Court, and all the particular cases in which it has been applied by the Judges of that Court as to these imperfect instruments — but it may be (and for the present purpose I think it fair to assume that it is)—fully proved that an instrument as complete as this in point of form and substance may nevertheless be brought within the rules applicable in the English Court of Probate before the Wills Act to imperfect instruments by any matter upon the face of it which shows that it was intended as a preliminary document—as a document looking forward to something else than itself, more perfect and more full, or more formal, perhaps, to be done. For example, there are cases in the books, in which you have such words as "Heads of the Will" that was the case in *Bone and Newsam* v. *Spear*, or "Plan of a Will" as in *Mathews* v. *Warner*, or "Sketch of my Will," as in *Hattatt* v. *Hattatt*, and still more "Instructions for a Will" or "Instructions to the Solicitor,"—all those headings have a tendency, very much greater than the title in the present case, to warrant the conclusion that although the testator's final intention may have been expressed in the instrument, yet it was not the final instrument which he had it in his mind to execute. "Heads," for example, though I think not necessarily, yet to a certain extent, give the idea that it is a summary, to be extended more fully afterwards. "Plan" and "sketch" rather more strongly indicate the same notion, and "Instructions" indicate it with precision and in a manner unequivocal. "Instructions for a Will" imply that the solicitor or law-agent is to be by some document instructed to prepare some other instrument. Instruments in all those forms have been held, and I think rightly held, under certain conditions to operate as testamentary acts provisionally but in view of the execution of a more formal testamentary act afterwards, and the particular character of such acts has led in the English Courts to certain conclusions which may be in such cases material, but which do not follow in cases of a different kind. Well, but this instrument falls very far short of any of those forms of expression. You have here "notes of intended settlement." The word "notes," as it seems to me, by no means necessarily implies that something more is afterwards to be done—that it is to be extended by a lawyer. It is not equivalent to "instructions," or equivalent to showing that the testator himself is not content to abide by the instrument as a sufficient expression of his intention. It would be almost an absurdity to suppose that the testator means instructions to himself. "Notes" certainly does not signify instructions to anyone else, and it appears to me that "heads" is very much the same as the word "memorandum." What the testator had in his mind when he used the word "notes" is certainly to be collected as properly from the instrument itself as the character of the instrument is to be interpreted by the word "notes." He has set down in this instrument his intended settlement.

Then it is said that the word "intended" implies something to be afterwards done. No. Why the whole language of all the decisions turns upon the testator's intention! The document is one that expresses an intention which according to all the books is ambulatory, and which is necessarily prospective and future. And therefore the word "settlement" if it stood alone, as it appears to my mind, would naturally, when applied to such an instrument as this, upon the face of it mean—This is the settlement which I intend to make of my estate after my death,—and I think the addi-

tion of the word "notes" in itself implies nothing more than that he had set it down as such. And I am glad, my Lords, to find that in a case where the word used was not "notes" but "memorandum" (which is certainly not more in favour of the conclusion) that view was taken by a learned Judge. I am referring to the case of *Barwick* v. *Mullings*, in the 2d vol. of Haggard, p. 225. There Sir John Nicholl acted upon exactly the principles upon which it seems to me that your Lordships ought to act now. The words were these—"This is a memorandum of my intended will." It is difficult to conceive anything more like "notes of intended settlement" except the difference between the word "notes" and the word "memorandum." Sir John Nicholl says—"In legal consideration, this paper upon the face of it being subscribed by the testator would be a finished and perfect paper. The subscribing it would be *prima facie* evidence that the deceased intended by that act to give it effect, and that though he began it as a memorandum, yet as he went on to use dispositive terms, and finally signed it, he altered his mind and converted it into an operative instrument." I hesitate to adopt that language precisely, because it really does not seem to me that either the word "memorandum" or the word "notes" necessarily implies a different intention at the beginning from that which is to be inferred at the end. The learned Judge then goes on to say—"more especially as the body of it is not in the handwriting of the deceased, so that the signature could not have been carelessly and thoughtlessly added, but intentionally and upon consideration." That circumstance, no doubt, has not occurred here, but no one can look over this instrument and think that there was anything careless or thoughtless in any part of it. The distinction therefore seems to me, under the circumstances, of no importance. Then he goes on—"Nor is there anything to show that he intended to do any further act to this particular instrument."—Nor is there here. "Still the term 'memorandum of my intended will,' would raise a sufficient doubt to let in evidence of circumstances whether it was finished in order to have effect, or only as a deliberative memorandum."—That is exactly what I say in this case—the words are enough to let in the evidence; but it is quite plain that Sir John Nicholl did not think, if the evidence threw no light one way or the other upon the instrument, the presumption was to be against the instrument; on the contrary, I should infer the very reverse from what he said.

Well, then, my Lords, that being so, it seems to me that there remains certainly no difficulty whatever in the case. One circumstance is to be noted here, namely, that you are not dealing, as in many of the cases which have been referred to, with that which would alter a previously formal and regular testamentary instrument, as to which there is, according to the language used, I think by Sir John Nicholl, also in the 4th vol. of Haggard, in the case of *Blewitt* v. *Blewitt*, a special presumption against the change of such previous regular dispositions by an imperfect instrument. He says, at p. 464 of 4th Haggard—"The strong presumption of law is always adverse to an unfinished instrument materially altering and controlling a will deliberately framed, regularly executed, recently approved, and supported by previous and uniform acts of disposition." I think, upon looking at the circumstances, it will be found that many of them, if not most of them, are of that character here. There is in the present case no such subsequent instrument, and the effect of raising presumptions against the instrument in question from the title would be to produce a total intestacy, and disappoint that which, as plainly as anything could make it, was the intention of the testator as to the settlement of his estate.

My Lords, is there anything in the parole evidence? The parole evidence really contains only three circumstances upon which any observation has been or could be made—first of all, that this document was found after the testator's death in a desk where there was some loose papers lying upon it, and a cash-book, and a banker's book. It seems to me that that was quite as likely a place for the testator to keep his will in as any other. At all events, I conceive no circumstance of less importance for the purpose of determining whether the document was testamentary or not. Then it is said that three years, I think after the date of the instrument, the testator asked his man of business whether he could increase the provision made for his wife by a marriage settlement. I am not myself inclined to found much upon that one way or the other; it seems to me to tell quite as much in one direction as in the other. He had done so by this instrument. It was argued on one side that if he had done so he would not be likely to ask such a question if he understood that it had been done. And on the other side it was suggested, that it was likely that having done it he would wish to be sure that he had not exceeded his powers, and that his intention could not be disappointed. One way of putting it countervails the other, and it results in nothing. Then there remains a third fact, which, if this had been an imperfect instrument at the time to which I refer, might have been of some importance in the appellant's favour, but which, as it was not so, tends rather the other way, namely, that being accustomed to consult in matters of business a Writer to the Signet who was related to or nearly connected with him, he never said a word to him upon this matter. Well, that is rather strong to show one or other of these two things—either that whatever he meant by that document he certainly did not mean it as instructions to a solicitor to prepare his will, for neither did he communicate with the man whom he was accustomed to consult nor with anybody else, or, on the other hand, if it be fair to construe these words as meaning that they were instructions to some solicitors, then no doubt it would be very difficult to get out of the lapse of time, tending to the conclusion that his original intention had been abandoned, and that he meant it provisionally only, and that it could not have been intended to operate down to the time of his death, because there being an actual change of purpose in that way apparent upon the face of the instrument, it having been meant as instructions to a solicitor, and there having been full time and opportunity, and no solicitor ever having been instructed, there was a departure from the intention to that extent at all events, and a Court of Probate under these circumstances would assume that there was no such intention at all. That is the principle of

what in English cases is called the doctrine of abandonment—a sort of implied revocation manifested. But I am willing to set that circumstance aside. I cannot construe the instrument or the title of it as showing that it was ever his intention to instruct any solicitor, and therefore it appears to me that at best the circumstance is neutral.

The result is, that the evidence is not of any value to assist us in the case, and in my judgment in the absence of evidence we must act upon principle. I therefore move your Lordships to affirm the interlocutor appealed from and to dismiss the appeal with costs.

Lord O'Hagan—My Lords, I am of the same opinion, and the Lord Chancellor has entered so fully into the case that I shall say a very few words to vindicate the reasons why I agree with him. In the first place, if we only see that the testator here at all events intended to make a will, and if he has indicated a clear purpose in an intelligible document, it certainly is not our business to be astute in discovering reasons for his intestacy, but rather to help his intention for the settlement of his affairs. I think that this may be fairly considered as the starting point in these cases, always of course taking into account that we must regard the principle of law and the rules of construction, but if we find within the principle of law and the rules of construction substantial reason to believe that a will was contemplated, and that a will has been effectually formed so far as the intentions of the parties were really involved, we are not upon trifling grounds to set aside the instrument which so indicates his real purpose. I quite concur with what the Lord Chancellor has said with reference to the burden of proof. No doubt if there be anything like inchoateness instead of completeness—if there be that which is equivocal instead of that which is certain—the burden of proof will fall upon the person propounding the instrument. But in a case like this, where I have paid as much attention as I could to the most able arguments which have been presented to us on behalf of the appellants, I can have no doubt in my mind. When I look to the instrument itself, construed apart from the introductory words which were added after the instrument was written, as is manifestly the case, I do not think it is an inchoate instrument. I think that it is a complete instrument. I do not think that it is an equivocal instrument. I think that it is absolutely certain in its terms, and that being so, it appears to me that there is no question about the burden of proof in the case, but if there be a question, in my opinion the instrument itself sustains that burden abundantly, and there is an end of that argument for the present purpose. Now, let me in a very few words just point attention to two or three circumstances which bear home to my mind the conviction that this ought to be dealt with as a completed and perfect instrument indicating the intention of the testator. In the first place, the will is written by himself from the beginning to the end. Looking at the instrument as it is presented to us, nobody can doubt that the signature was made by the man at the time or about the time when the paper was completed. It was signed contemporaneously with the document, or at some time shortly afterwards. It appears to me that the will itself indicates abundant intelligence, capacity, and knowledge of what he was about. If one looks to the terms of the will, and looks to the changes that are made in one or two places, I think, in it, and the corrections which have been made, it is perfectly evident that the testator was quite competent to do his own work, and knew perfectly well what he was about and what he did. That, I think, is an important thing when you come to consider other parts of the case. In addition to that, the arrangement here, so far as we can judge from the facts presented to us on the part of the appellants themselves, was a perfectly reasonable and right arrangement. It was an arrangement made by a gentlemen about 60 years of age with reference to the members of his family, in an intelligent and perfect fashion. Then we have this further point, that the instrument disposes of the whole of his property with the exception of a very small portion, as we were candidly told, not differing from the case of an absolute disposition. Therefore, if he intended to make a final settlement of his property, he did so, for he made a final settlement of his property in an intelligible way. Then, in addition to that we have had a great deal of observation upon the mode in which this document was kept, where it was kept, and so forth. It appears to me that there really is nothing in that; looking to the evidence of Mr Walter Whyte Pollok, who was related to the testator and to all that is stated. I think that the Lord Ordinary spoke of the company of the document as rather impeaching the document itself. But I think that it was in very respectable company, and very important company to the individual, because according to Mr Walter Whyte Pollok it was in company with the bank book and the cash day-book and the vouchers. There were business letters, to be sure; they may have been very important business letters; and I do not see why this man should not have kept his will along with his bank book and his cash day-book, which vitally affected his business and his fortune. Then we have also the fact that it was kept in a depository of which he had the key, always kept in his own pocket. He never appears in the seven years during which the instrument remained in that depository to have parted with the custody of the key, and if that be so it is rather an indication, I should say, that the documents which were put there were documents valued by him—carefully to be kept, and carefully kept. Therefore it appears to me, so far as that is concerned, that the evidence of the custody is in favour of the respondent, and not of the appellants.

Now, there is another circumstance in this case which bears very strongly upon my mind, and that is the length of time during which this instrument was preserved in the place and under the circumstances which I have described, and the attendant circumstances with reference to the people with whom the testator had to deal. For seven long years this instrument, so prepared with such intelligence, with such completeness, and with such apparent satisfaction with reference to the purpose of the testator, remains in this locked desk—there is no change at all, although during those seven years he has the fullest opportunity, supposing that this instrument was intended merely as instructions for a will, and not as a will itself, of having it reduced to a formal shape. We have the evidence of the same Mr Whyte

Pollok to the effect that this gentleman was in the habit of going into Glasgow every week and calling at the office of a Writer to the Signet in Glasgow, his own relative, who had been employed by him in other businesses of a legal kind, and yet during the whole of those seven years, having the opportunity any day of submitting this, as it is said, inchoate and imperfect instrument to be completed by a man in whom he had the fullest trust, and who was of the greatest competency, he never mentioned it at all. It appears to me that the effect of that is not at all to indicate that he had forgotten what he was about—that he had forgotten what he had done—but that he determined in his own mind that he had done it perfectly well. He may have had the indisposition which many men have to inform people generally, or even their friends, of what they have done in the way of testamentary action; he may have had that feeling—at all events, he had the instrument so deliberately kept, and so carefully kept. He had the opportunity of communication with competent persons, on whom he had reliance as legal practitioners, and the fact of his doing nothing of that kind for the whole seven years appears to me to be evidence of deliberate intention, which we cannot possibly put out of our consideration. Besides that, what has been presented as an agreement on behalf of the appellants appears to me to tell the other way with reference to a particular provision for a particular member of his family which has been pressed upon us. I refer to an arrangement which had been made. If he had had any desire or disposition to deal with the document, not as a competent instrument, but as an inchoate provision, which was afterwards to be carried into effect, no doubt at that time he would, in all human probability have indicated a desire of that sort, and have had the instrument put in proper shape.

Now, these are the circumstances which appear to me conclusively to show that we are to take the instrument within its four corners. If there had not been this introductory line, prepared by this man, under what circumstances we do not know, and never can know, could there have been the possibility of saying that there was anything equivocal, that there was anything doubtful, that there was anything inchoate in the matter at all? The words are as positive and distinct and emphatic and imperative as any words which can be used. The thing is complete in itself for the purposes of the testator. What is there to indicate to any mind—legal mind or common mind—that it was not his completed and deliberate intention as to the disposition of his whole estate? It appears to me that there is nothing. That being so, it does not appear to me that there is enough in these introductory words to throw a doubt upon that which but for those introductory words would in my opinion be absolutely certain. In the first place, what has been said is perfectly true—(I am not going into the cases after the discussion of them by the Lord Chancellor)—that the Lord Ordinary was justified in putting this matter to proof because of this apparently equivocal statement. I will not say a word about it at this moment, antecedent to the completed will. What is the effect of that? Its effect is to put upon the parties to give evidence actually of sustainment of the instrument as a will. What has happened? Has there been any evidence given to impeach the will? On the side of the appellants has their been any evidence given which is of the slightest avail for their purposes. In my opinion there is nothing of the sort. I have indicated already the points on which my opinion rests. In my opinion the evidence goes altogether the other way. I mean as to the communication with the solicitor, the company and place in which the thing was found, and the circumstances under which it was found, and the other matters to which I have referred. That is the whole of the evidence which has been called on in the question that has been raised upon this document, and that evidence appears to me to go directly in favour of the respondent, and against the appellants. Therefore there is nothing in it in my opinion to impeach the completeness with reference to the will itself.

Well, but it is said that the heading has that effect. I will repeat what I indicated when Mr Inderwick was addressing the House, namely, that it does not appear to me at all that this heading is so clear an expression of opinion on the part of the deceased as to raise really a substantial doubt on the matter. If substantial doubt be raised in the matter, in my opinion the thing may be sustained rather than that the question ought to be determined the other way. But when you look at these words, and see what they are, it does not appear to me that it is necessary at all to say that they cast any doubt upon the completeness and the perfectness of the will. "Notes of intended settlement by Walter Whyte of Bankhead." Now, it occurred to me early in the argument that a great deal of the discussion arose upon a misconception of the word "settlement"—that the word "settlement" does not necessarily mean a deed which is to be prepared, or a will that is to be prepared. But that this is a Scotch case I should have said that the word "settlement," according to the habits of people in England and in Ireland, ought to be taken in another sense altogether. You would not think of calling a will a settlement in this sense. You may very fairly read it as if the man said—"This is a note of the arrangement of all my affairs which I intend to have carried out for the benefit of my family." It appears to me that these words are quite equal to bearing that meaning, and that there is then not a doubt, and really no sort of question or darkness, upon the will itself. I think that they are quite equal to bearing that construction, and if that construction be the right one, *cadit quæstio*. There is no argument in the case. The case never should have been sent to proof at all. The will itself in that way would be perfectly complete and unimpeached and unimpeachable. But if the thing was equivocal, and if the words were capable of bearing the one construction and the other—the construction of the appellants and the construction which I venture to suggest—then I apprehend that we might call in aid that about which there is no doubt and no question, namely, the absolute provisions of the unequivocal will in sustainment of the will of the man, and for the purpose of carrying out his intention and preventing a defeat of it, and we might say—"We will take a construction which is beneficial to the will, and not a construction which will destroy it."

Taking the whole of the case into account, I

confess that but for the fact that there was a diversity of opinion in the Courts below, I should say that I have no doubt that this appeal ought to be dismissed with costs.

Lord Blackburn—My Lords, I also agree in the opinion that this appeal ought to be dismissed with costs. The question arises upon a Scots instrument, and must be governed by the laws of Scotland, no doubt; but to a certain extent the laws of Scotland and the laws of England agree in this, that a person has a right to dispose of all his property, and to say how it shall be dealt with after his death, within, of course, the rules of law. They also both agree in this, that if he does it with the formalities which are required by the law of the country in which it is being dealt with, that is good and valid after his death. But the formalities on the essential matters which are required by the laws of the two countries are not the same. In England since the Act of Victoria—since the year 1838—the instrument is required not only to be in writing, but to be signed and witnessed.

That is not the law in Scotland at all. In England, before the Act of Victoria, so far as regarded personal property, there were some cases which, as it was before my time, I have never had occasion to look at, and upon which I certainly should not express an opinion without hearing out the argument on both sides,—cases such as that of the *Earl of Scarborough's* will, which has been mentioned, where a set of intentions on the part of the testator, which would not amount to a will, or which formed an imperfect will, have been held to be good if he died under such circumstances as to show that he was only prevented by death from making those intentions a perfect will. I am not quite certain that I thoroughly know how that matter was in the Probate Courts before the Statute of Victoria, and I certainly would not express an opinion upon it without hearing counsel on both sides. And I do not know whether that was ever the law in Scotland at all, and upon that point still less would I express an opinion without hearing counsel out on both sides. But I am quite clear that in this case no such question arises. If this instrument which the testator left behind him was not a will, but was an imperfect instrument, he lived for seven years after writing it, in constant communication with his man of business whom he was in the habit of employing, and there certainly is not the slightest ground for saying that he was prevented from making it perfect (if it required something to make it perfect) in an unexpected way. I therefore think that that question does not arise at all; and I express no opinion either upon what was the extent of that doctrine in England, or whether that doctrine was part of the law of Scotland or not. But in Scotland, as I said before, it was not required that the instrument to carry out the deceased's intentions should be witnessed. The common talk of Scots lawyers, I think, as far as my knowledge goes (being a Scotsman myself), would be to say that that instrument which declares the intention of the testator would be a "settlement;" that would be the usual phrase employed—meaning that that is the way in which he settles the disposition of his property after his death. In England I think it would be common to say, "That is the way in which he makes his will," but I think that they both mean the same thing; they mean—that is the effect of his intention as to how his property shall go after his death. It has to be carried out according to the law of the country, and all the Judges below agree (and it has not been disputed at the bar) that if it had not been for the heading "Notes of intended settlement by Walter Whyte of Bankhead" this would have been a most perfect will according to the Scots law, properly executed, and perfect in all respects.

The only question then is, What is the effect of the words "Notes of intended settlement by Walter Whyte of Bankhead?" If the testator had written in express terms, as some people did in England before the Statute of Victoria, in order to avoid any dispute about the matter—"This is not testamentary, but is merely to be considered by myself, and considered by my legal advisers afterwards," no one could for a moment contend that this would have been a good will; it would not have amounted to a declaration of his intentions so as to be carried out. On the other hand, if he had merely written, "This is notes of my settlement," nobody, I think, could have disputed for a moment that he was using the word "settlement" in the way in which a Scotsman would use the word—meaning simply, "This is my last will and testament." As it happens, he has used the words "notes of intended settlement;" and all the Judges below thought (and I probably agree with them—but that is not very material) that the expression is sufficiently ambiguous to permit the admission of extrinsic testimony to show whether this instrument was only meant by him as a memorandum of what he intended to have drawn up afterwards (or himself to draw up afterwards), or whether it was a final settlement signed by him.

Now, on that question evidence was given, and I think that if I were bound to go upon niceties, I should say that that evidence rather tends in the direction of supporting the view that this instrument was meant by the testator to be a final settlement. But it so very slightly tends to support that view (I will not go through the evidence again) that I would not act upon it all. The true way of looking at this case, or at least the way in which I intend to look at it, is that the whole evidence certainly comes to nothing upon which I would act. That being so, we are brought back to the point, What is this instrument meant by the testator to be, with the words at the top of it, "Notes of intended settlement by Walter Whyte of Bankhead," and then going on, as has been repeatedly pointed out, in the most sensible, straightforward, clear, and business-like manner to express a present intention to give his wife an additional annuity, to give this estate to one, and that estate to another, all used in the present tense, and signed by him, which if it was a mere memorandum would be utterly unnecessary, but if he meant it to be a final disposition he should sign it, and that would be sufficient. If he meant it as instructions to his solicitor, there might be a reason for signing it as "Walter Whyte;" but then that would have been followed up by sending it to his solicitors.

Looking at the case altogether, my conclusion is (agreeing with the majority of the Judges of the Court of Session, and disagreeing with the Lord Ordinary) that in the absence of some ex-

trinsic evidence to show the contrary, this instrument ought to be taken as a final declaration duly made according to the law of what was a settlement of the testator's affairs to be carried into effect after his death, and that in that sense the words "notes of intended settlement" should be understood and construed.

Lord Watson—My Lords, the holograph document propounded as the will of the late Mr Whyte of Bankhead is, if its title be left out of view, a complete and well-executed testamentary disposition of the whole heritable and moveable estate belonging to the writer. There would have been no doubt raised as to its validity had not Mr Whyte written at the top of the first page of the document a title in these terms—"Notes of intended settlement by Walter Whyte of Bankhead."

The parties are agreed that the effect of such a title is to admit evidence of all facts and circumstances from which it may be legitimately inferred either that the writer intended the document to be his last will and settlement, or that he merely regarded it as a memorandum or jotting for his own or his law-agent's guidance in framing a formal will. The controversy between the parties is confined to the principle upon which extrinsic evidence is admissible. The appellant contends that it is admitted because on the face of the writing there arises a doubt as to its true character, which if not explained will prevent its taking effect as a will, and accordingly that the party propounding it must fail unless he can dispel the doubt by satisfactory proof.

To that argument I cannot assent.

The document taken by itself is a complete and valid will, and the ambiguous language of the title cannot in my opinion deprive it of validity. I cannot understand upon what principle a mere ambiguity occurring in the descriptive title written by the testator can be held to qualify the terms or to destroy the validity of the document which it professes to describe, when the legal character and effect of the document taken by itself are not doubtful. Such an ambiguity will justify inquiry which may confirm the testamentary character of the document, and may, on the other hand, lead to the conclusion that the writer intended it to be nothing more than a paper of notes or jottings for the preparation of a will at some future period, but should the parties lead no proof, or should the proof adduced by them be inconclusive, the document must receive effect according to its tenor and substance.

The law appears to me to have been laid down, as I have endeavoured to state it, in the case of *Barwick* v. *Mullings* (2d Haggard 225), where the body of the writing propounded, which was conceived in dispositive terms, and was dated and signed by the deceased, began with these words—"This is a memorandum of my intended will." It is clear to my mind that Sir John Nicholl, although he permitted inquiry, would in the absence of evidence have pronounced the paper to be the will of the deceased. I cannot discover any appreciable shade of difference in the meaning of these expressions "memorandum of my intended will," and "notes of intended settlement by Walter Whyte," and I do not think the appellant can derive any benefit from the circumstance that the expression occurs in a separate heading or title, and is not incorporated with the dispositive part of the writing, as was the case in *Barwick* v. *Mullings*. I have therefore come to the conclusion that the writing of the 19th of June 1873 is *prima facie* the will of the deceased Walter Whyte, and that as such it must receive effect, unless it has been proved that Mr Whyte did not so regard it.

None of the Scots authorities cited in the course of the argument have a material bearing upon the present case. The case which in its circumstances comes nearest to the present is *Forsyth* v. *Forsyth's Trustees* (10 Macph. 616), but there the judgment of the Court was rested upon these facts—first, that the writing, which was alleged to be a holograph codicil to a former trust-disposition and settlement previously executed by the deceased, was incomplete, inasmuch as there was a blank space on the paper which had the effect of leaving the bequest undisposed of in an event for which the writer would presumably have provided in any final expression of his intentions; secondly, that it was headed "Draft of a codicil," and that the writer had on previous occasions employed his professional adviser to prepare a formal deed from instructions prepared by himself; and lastly, that it was not found in the deceased's repositories along with his general deed of settlement, but in an open drawer in which he kept his wearing apparel.

If upon the evidence led in this case I had come to the same conclusion with the Lord Ordinary, I might have hesitated to assent to the judgment of the Inner House. His Lordship held it to be established by the proof that the late Mr Whyte had in the year 1877 a conversation with his law-agent, which indicated that according to the belief of the deceased he had not at that time made any addition to the provisions settled upon his wife by their antenuptial contract of marriage, and also that the place where the writing was found after his death was inconsistent with the idea that it had been preserved by him as a testamentary writing. I cannot agree with either of these conclusions. The terms of the conversation in 1877 as related by Mr Pollok are consistent with the supposition that Mr Whyte was desirous to ascertain whether the document which he had previously written and signed would be effectual; and the fact that the document was found in the private desk of the deceased, which was always locked, and of which he constantly kept the key, cannot in my opinion cast any discredit upon it. The evidence appears to me to be almost neutral in its character. It does not afford any decisive indication of the deceased's understanding and belief that he had made a will, and it as little suggests the inference that he understood and believed that the writing of the 19th of June 1873 was a simple memorandum or note of instructions.

I am accordingly of opinion with your Lordships that the interlocutor appealed from must be affirmed.

Interlocutor appealed from affirmed, and appeal dismissed with costs.

Counsel for Pursuer and Respondent—Herschell, S.-G.—Asher, S.-G.—Murray. Agents—Tods, Murray, & Jamieson, W.S.—Connell, Hope, & Spens.

Counsel for Defenders and Appellants—Balfour, L.-A.—Inderwick, Q.C. Agents—Campbell & Smith, S.S.C.—Grahames & Currey.

COURT OF SESSION.

Thursday, February 23.

OUTER HOUSE.

[Lord Fraser.

MARSHALL & SONS *v.* SPIERS AND OTHERS.

Process—Diligence to Recover Documents.

Diligence *granted* to the defenders of an action to recover documents in possession of the pursuers before the case had appeared in the Adjustment Roll—the documents being essential to enable the defenders to meet the pursuers' case.

This was an action brought by George Marshall & Sons of Philpot Lane, London, shipowners, and owners of a vessel named the "Sussex," against the defenders, all underwriters in Glasgow, for payment to the pursuer of the proportions of a policy of insurance for which they had underwritten the said ship "Sussex," on the allegation that she had been wrecked in the month of July 1881, and was then lying at Port Stanley in the Falkland Islands.

The pursuers pleaded—"(1) In the circumstances condescended on, the pursuers were entitled to abandon the 'Sussex,' and claim under the policy libelled for a constructive total loss of the ship."

The defenders pleaded—"(2) The 'Sussex' not being a constructive total loss by perils insured against, the defenders are entitled to absolvitor with expenses."

The summons was signeted 1st February 1882, and on the 23d February the defenders craved a diligence for the recovery of surveys and reports &c., relating to the present condition of the ship, which were stated to be necessary for the preparation of their case.

Defenders' authorities—*Robertson* v. *The Earl of Dudley*, July 13, 1875, 2 R. 939; *China Transpacific Steamship Company* v. *The Commercial Union Insurance Company*, Dec. 12, 1881, 30 Weekly Reporter, 224.

In granting the diligence LORD FRASER said—"I have always been of opinion that the rule which was rigidly enforced when I came to the bar, that no diligence should be granted for the recovery of writings before the record was closed, very often operated unjustly. Lord Jeffrey, I remember, in one case denounced the rule. The result of it in practice was that it compelled parties to put on record random averments in order to meet a case the grounds of which they did not and could not know, because the means of knowledge were denied them. In the present case the hardship of the rule—if it exists—is very well seen; for the pursuers are in possession of the ship in question, and have reports as to her exact condition at the time when that is in dispute, and I think the defenders are fairly entitled to have the means of ascertaining what that condition was before the record is closed. I shall accordingly grant diligence."

His Lordship pronounced the following interlocutor:—"The Lord Ordinary having heard counsel, grants diligence at the instance of the defenders against havers for recovery of all surveys and reports on the hull and cargo of the ship or vessel called the 'Sussex,' made since 12th April 1881, and also all letters and telegrams between the owners or anyone on their behalf, and the master or ship's agents, or any other person acting on behalf of the 'Sussex' at Falkland Island, since said date as to the state of the hull and cargo."

Counsel for Pursuer—Jameson. Agents—Boyd, Macdonald, & Jameson, S.S.C.

Counsel for Defenders—Dickson. Agents—Webster, Will, & Ritchie, S.S.C.

Thursday, May 25.

OUTER HOUSE.

[Lord Fraser.

DUNCAN *v.* DUNCAN.

Parent and Child—Aliment—Obligation of Children to Aliment Parent—Process—All Parties not Called.

The obligation of children to aliment a parent is a joint and several obligation, and no one of them pursued by the parent for aliment is entitled to have the rest called as defenders.

This action was brought by John Duncan, blacksmith, residing in Ayrshire, against his son John Duncan, residing in Fifeshire, to have him ordained to pay to his father the sum of £30 yearly as aliment. The father was 85 years of age, unable to work, and in great poverty; his family consisted of four daughters, all of whom were married, and three sons; the defender was the only son who at the time the action was raised was residing in Scotland.

The defender pleaded as a preliminary defence—(1) All parties not called.

After hearing counsel, the Lord Ordinary (FRASER) repelled the said plea, and delivered the following opinion:—"The rule that all parties have not been called is an equitable rule which will not be enforced in circumstances where it would practically defeat the action, or where it would operate oppressively. In the present case it would operate in the latter way. A father seeking aliment from his children or from his daughters' husbands is a person presumably in very reduced circumstances, and therefore incapable of furnishing the means of litigation. If he were obliged to call all his descendants and the husbands of female descendants, he would possibly find them scattered in different counties in Scotland, and therefore his action could only be competent in the Supreme Court. This would be a hardship in itself. In the next place, the defences by each child to a claim by a father might be of the most varied description, involving troublesome and expensive inquiries. One child might have as a defence the alleged fact that he only earned enough for his own subsistence with regard to the locality in which he lives, and h is would require to be investigated. Another hild with large weekly wages pleads the bur-